

SERVICE DATE - MAY 14, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 590 (Sub-No. 1X)

MARYLAND TRANSIT ADMINISTRATION—ABANDONMENT EXEMPTION—IN
SOMERSET COUNTY, MD

Digest:¹ This decision dismisses Maryland Transit Administration's request to abandon approximately 14.57 miles of rail line in Somerset County, Md., as well as a corresponding petition seeking exemption from the Board's offer of financial assistance provisions and public use provisions.

Decided: May 13, 2015

On November 26, 2014, Maryland Transit Administration (MTA), a noncarrier, filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon approximately 14.57 miles of rail line in Somerset County, Md. (County), between valuation station 90+50, as shown on valuation map V19-38, near Final System Plan MP 1.2 near Kings Creek, Md., and valuation station 850+35 +/-, as shown on valuation map V19-53, near FSP MP 16.3 near Crisfield, Md. (the Line). MTA concurrently filed a petition seeking an exemption from the Board's offer of financial assistance (OFA) and the public use provisions at 49 U.S.C. § 10904 and 49 U.S.C. § 10905, respectively.²

On February 11, 2015, the Board directed MTA to file supplemental information describing the Line's status and history in more detail. Specifically, the Board requested that MTA (1) address whether the Line was previously abandoned, either at the time it acquired the Line or at some point thereafter; (2) address whether revocation of Common Carrier Status of States, State Agencies & Instrumentalities, & Political Subdivisions (Common Carrier Status), 363 I.C.C. 132 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982), the exemption under which MTA states it acquired the Line, would be necessary prior to the Board determining whether to publish the requested notice of exemption; and (3) discuss the public

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² To provide additional time for the Board to fully consider the arguments presented, the Board issued a housekeeping stay in this proceeding on December 30, 2014. Md. Transit Admin.—Aban. Exemption—In Somerset Cnty., Md., AB 590 (Sub-No. 1X) (STB served Dec. 30, 2014).

benefit of its proposal to use the right-of-way to provide additional electrical access and capacity and how that proposal would be consistent with the Board's precedent for granting exemptions from the OFA (49 U.S.C. § 10904) and public use (49 U.S.C. § 10905) provisions.

On March 13, 2015, MTA filed the supplemental information requested by the Board. For the reasons discussed below, the Board dismisses MTA's verified notice of exemption, as well as its petition seeking exemption from the Board's OFA and public use provisions.

BACKGROUND

According to MTA, the Line, which is part of the right-of-way known as the Crisfield Secondary Track, was excluded from transfer to the Consolidated Rail Corporation (Conrail) or another profitable railroad under the Final System Plan (FSP) and was approved for abandonment and made available for public subsidy or acquisition.³ MTA states that, although the FSP identified the Line as being the subject of an interim application for abandonment under section 304(d) of the 3R Act, MTA has not found any records indicating that abandonment was consummated through notice to state and local governments in accordance with the 3R Act. MTA concludes that therefore the Board retains jurisdiction over the Line and that it was exempt under Common Carrier Status from the requirement to seek authority from the Interstate Commerce Commission (ICC), the Board's predecessor, to acquire the Line in 1982 and is now exempt from the requirement to seek Board authority to abandon.⁴

MTA states that there have been no rail carrier operations on the Line for nearly 40 years and that it anticipates no demand for rail service on the Line in the future.⁵ MTA, nonetheless, requests that the Board grant its verified notice of exemption in order to provide an opportunity for trail use and rail banking. According to MTA, it and the County have been negotiating with Delmarva Power, a subsidiary of Pepco Holdings, Inc., regarding use of the Line's right-of-way for a new electric transmission line that would enhance electrical grid stability by providing an additional source of electric power to three substations.

³ The United States Railway Association formulated the FSP in the 1970s. It designated which lines were to be retained in active service through transfer to Conrail, a government-created successor railroad to the various northeastern railroads in reorganization, and which lines would be allowed to be abandoned. The FSP was submitted to Congress on July 26, 1975, and was specifically approved in section 601(e) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976).

⁴ Verified Notice of Exemption 2 n.1; Resp. 4-6.

⁵ Resp. 17; Envtl. Report 12 ("No rail carrier operations have occurred on the Line since 1976.").

DISCUSSION AND CONCLUSIONS

Because the Line was previously approved for abandonment,⁶ the key question is whether the Line has been fully abandoned and thus is outside the Board's jurisdiction, or whether it remains merely authorized for abandonment and therefore still within the Board's reach. As explained below, the Board finds that the Line has been abandoned and therefore dismisses MTA's verified notice of exemption and petition for lack of jurisdiction.

It is well established that once an entity exercises abandonment authority, the rail line is removed from the national transportation system, in which case the line ceases to be within the Board's jurisdiction. Hayfield N. R.R. v. Chi. & N. W. Transp. Co., 467 U.S. 622, 633 (1984); Preseault v. ICC, 494 U.S. 1, 5 n.3 (1990); Becker v. STB, 132 F.3d 60, 62-63 (D.C. Cir. 1997). In contrast, unless and until abandonment is actually consummated, a line that has been authorized for abandonment remains within the Board's jurisdiction, because abandonment authority is permissive and not self-executing. See Beaufort R.R.—Modified Rail Certificate, FD 34943 (STB served July 21, 2009); Norfolk & W. Ry.—Aban. Exemption—Between Kokomo & Rochester In Howard, Miami, & Fulton Cntys., Ind., AB 290 (Sub-No. 168X) (STB served May 4, 2005). In other words, if an entity chooses not to exercise abandonment authority granted by the Board, the line remains subject to the Board's jurisdiction.

Historically, determining when abandonment authority was consummated was determined by a case-by-case evaluation of all the facts and circumstances to determine the line owner's intent. Beaufort R.R.—Modified Rail Certificate, FD 34943 (STB served Mar. 19, 2008). In determining intent, the Board looked to the line owner's actions considered in their entirety, assessing both the owner's stated intentions and the various physical acts taken that might carry out that intent, such as cessation of operations, cancellation of tariffs, the length of time there had been no rail service, efforts taken to maintain the line, salvage of the track and track materials, and relinquishment of control over the right of way. Id. See also Becker, 132 F.3d at 62; Birt v. STB, 90 F.3d 580 (1996); Black v. ICC, 762 F.2d 106, 112-113 (D.C. Cir. 1985). Under this approach, determining whether or when abandonment authority was consummated often proved elusive. In 1997, the Board established a requirement that railroads authorized to abandon lines must, when actually abandoning a line, file a "notice of consummation" of abandonment. 49 C.F.R. § 1152.29(e)(2). Although today railroads must file such a notice with the Board in order to consummate abandonment authority, for lines authorized for abandonment before 1997, the Board generally looks to the railroad's intent, on a case-by-case basis, to determine whether abandonment authority was actually consummated.

MTA argues that abandonment of lines excluded from transfer to Conrail or another profitable railroad under the FSP requires that the entity provide notice to state and local governments in accordance with 45 U.S.C. § 744(b). MTA states that it has no record of such a notice being issued before or after the State of Maryland purchased the Line in 1982 and that, therefore, abandonment of the Line has not been consummated.

⁶ Verified Notice of Exemption 2; Resp. 2, 5.

However, even if there is no record of notice being sent in accordance with 45 U.S.C. § 744(b), the State's intent, as demonstrated by an examination of the relevant factors, indicates that the Line has already been abandoned. In its verified notice of exemption, MTA concedes that "[n]o rail carrier operations have occurred on the Line since 1976" and that the Line has already experienced "the impacts of...abandonment" because freight rail service ceased many years ago.⁷ MTA further states that the Line's rail facilities "are in deteriorated condition," that it anticipates no demand for rail service on the Line in the future, and that the "cost of any upgrades or maintenance required to return the Line to active freight use would be prohibitive."⁸ These circumstances are inconsistent with intent to keep the Line in a state of readiness for service, even if as MTA states, the Line was not abandoned prior to the State of Maryland acquiring it. Instead, they indicate intent to cease permanently all transportation service on the Line.

Furthermore, the evidence does not support MTA's assertion that removal and salvaging of track, and lack of maintenance or weed control, should be construed to indicate an intent to effect mere termination of service (rather than an intent to abandon) in this case.⁹ Although these factors can indicate merely intent to discontinue service, here we find that such actions signify abandonment, given the lack of freight service over and deteriorated condition of the Line, the salvage and removal of the track, and the amount of time that has passed since rail operations have taken place. See Becker, 132 F.3d at 62. It is implausible that MTA would intend only to discontinue service when it never provided service on the Line or contracted with an operator to do so, the track has been removed and salvaged, and there have been no carrier operations on the Line in nearly 40 years.

Moreover, in another Board proceeding, a different line segment—which had also been excluded from transfer to Conrail or another profitable railroad under the FSP and which the State of Maryland acquired pursuant to the same transaction by which Maryland acquired this Line—was treated by the Board and the parties as abandoned. See Walkersville So. R.R.—Operation Exemption—Line Owned by the State of Md., FD 32329, slip op. at 1 n.1 (ICC served Sept. 30, 1993).

In considering all of these facts, we find that the Line owner's actions, viewed in their entirety, are consistent with abandonment. There are numerous indications here demonstrating that this is no longer an active rail line within the national rail system. If the Line owner had a continuing intent to provide rail service on the Line, we would expect to see some evidence demonstrating that intent during the nearly 40 years since the State acquired it. Here, however, MTA neither instituted service on the Line nor contracted with an operator during all of this time. Moreover, MTA indicates that the track has been salvaged and removed and offers no evidence that it has undertaken efforts to maintain the Line and keep it in a state of readiness for rail service, or that there is any present potential need for active rail service. Based on the

⁷ Env'tl. Report 7, 12.

⁸ Pet. 3; Env'tl. Report 3; Resp. 17.

⁹ Resp. 9 (citing Birt, 90 F.3d at 586).

totality of the circumstances, we, therefore, dismiss MTA's verified notice of exemption and corresponding petition for lack of jurisdiction.

It is ordered:

1. MTA's verified notice of exemption and petition are dismissed.
2. This decision is effective on its date of service.

By the Board, Acting Chairman Miller and Vice Chairman Begeman.